

Rebecca White Berch (Justice, ret.), Chair
Task Force on the Arizona Rules of Probate Procedure, Petitioner
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SUPREME COURT OF ARIZONA

PETITION TO ADOPT RULE 28.2,) Supreme Court No. R-18-0037
ARIZONA RULES OF PROBATE)
PROCEDURE)
) Emergency Adoption Requested
_____)

Rule 28(h), Rules of the Supreme Court, permits expedited consideration of a rule petition and emergency adoption of a court rule. Petitioner requests the Court's expedited consideration of this petition and emergency adoption of a new Rule 28.2, Arizona Rules of Probate Procedure. The proposed rule is appended to this petition.

1. Background. By the entry of Administrative Order No. 2017-133 on December 20, 2017, the Court established a Task Force on the Arizona Rules of Probate Procedure ("Task Force"). The undersigned was designated as the Task Force Chair.

The Arizona Rules of Probate Procedure ("Probate Rules") govern procedures in all probate proceedings, including guardianships and conservatorships. The Order directed the Task Force to review the current Probate Rules, and then to propose

changes that simplify and clarify these rules and conform them to contemporary practices. The Order set January 10, 2019 as a goal for the Task Force to file a rule petition seeking those changes. The Task Force has met regularly throughout 2018 to meet this goal.

2. Reason for the adoption of Rule 28.2. Current Probate Rule 3(A) provides, “Unless otherwise provided in these rules or inconsistent with these rules, the Arizona Rules of Civil Procedure apply to probate proceedings...” (The Task Force’s proposed version of this rule similarly says, “The Arizona Rules of Civil Procedure apply to probate proceedings unless they are inconsistent with these probate rules....”) There is no Probate Rule equivalent of current Civil Rule 38(b), and that rule accordingly applies in probate proceedings. Current Civil Rule 38(b) permits a party to obtain a jury trial in a probate proceeding, to the extent that a right to a jury trial exists, by filing and serving a timely demand for a jury.

At its August 2018 Rules Agenda, the Court entered Rules Order No. R-18-0018 and modified Civil Rule 38(b). The modified rule becomes effective on January 1, 2019. The R-18-0018 Order replaces the current title of Rule 38(b), “demand,” with the new title of “waiver.” The Order strikes all the text of current Rule 38(b) and replaces it with new text. The text of new section (b) provides that parties are deemed to have waived a right to trial by jury “only if they affirmatively

waive that right.” Put simply, under current Rule 38(b), a party must demand a jury trial; under new Rule 38(b), a jury trial is automatic unless waived.

A.R.S. § 14-1306 states: “*If duly demanded*, a party is entitled to trial by jury in any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.” (Emphasis added.) A.R.S. §§ 14-5310 and 14-5401.01, which concern petitions for temporary guardians and temporary conservators, respectively provide that a hearing on the petition “does not limit the parties to any rights they may have to trial by jury.” Under A.R.S. § 14-5303(C), “an alleged incapacitated person is entitled to...trial by jury” on a guardianship petition.

New Rule 38(b) is impractical in probate court proceedings concerning alleged incapacitated persons. Current Civil Rule 38(b) has not been problematic because alleged incapacitated persons and their counsel rarely filed demands for jury trials. They are almost always satisfied with a bench trial. Under new Rule 38(b), however, these individuals will automatically have a jury trial unless they waive that right. The dilemma is that the great majority of these individuals lack the capacity to knowingly and intelligently waive that right. In the absence of waivers under new Civil Rule 38(b), the trial court will need to provide jury trials in guardianship proceedings —and possibly in conservatorship proceedings — beginning January 1, 2019.

The Task Force’s rule petition, which it expects to file in January 2019, will include a new Probate Rule, numbered 28.2 concerning a demand for jury trial. Rule 28.2 includes sections (a) (“demand”), (b) (“specifying issues”), and (c) (“waiver; withdrawal”) modeled on current Civil Rule 38(b). Rule 28.2 also includes sections (d) (“if a demand is made), (e) (“if no demand is made”), and (f) (advisory jury; jury trial by consent”) that are based on current Civil Rule 39. (The R-18-0018 Order also abrogates the text of current Civil Rule 39(a)-(c).)

Rather than waive a jury trial, as new Civil Rule 38(b) would require, proposed emergency Probate Rule 28.2 would require a party to a guardianship petition — and a party to a conservatorship petition, to the extent the right to a jury exists — to affirmatively demand a jury trial. In the absence of a demand, the alleged incapacitated person would have a trial to the court.

3. Reasons for expedited adoption of Rule 28.2. [The data book prepared by the Administrative Office of the Courts for calendar year 2017](#) reported that statewide, there were 205 jury trials in civil cases and 795 trials in criminal cases, or 1000 jury trials throughout Arizona. The data book also reported that during the same year, 4,740 guardianship and conservatorship cases were filed statewide. (The data book did not differentiate between the number of guardianships and conservatorships.) However, Maricopa County data indicates that about 1800

guardianship petitions are filed annually. After adding in the other fourteen counties, there are probably more than 2000 guardianship petitions filed annually statewide.

A.R.S. § 14-5303(C) affords a right to jury trial to the alleged incapacitated person in a guardianship petition. If every guardianship petition resulted in an automatic jury trial, the number of jury trials statewide in 2019 would likely be triple the current number. If only half of the guardianship petitions resulted in an automatic jury trial, the number of jury trials statewide in 2019 would probably double. The increase would place a substantial strain on existing court resources. It would require the trial court to summon many more jurors to court and pay them for their service. It would increase the length of guardianship hearings and create tremendous backlogs in probate proceedings. It would probably have a ripple effect on other non-probate case types that require trials by jury.

4. Request for expedited adoption. To avoid the need for jury trials in guardianship and conservatorship proceedings beginning on January 1, 2019 — the effective date of new Rule 38 — petitioner requests that the Court adopt Probate Rule 28.2 on an emergency basis, with a concurrent effective date of January 1, 2019. The Court could thereafter

- open this emergency petition for comment, and

- consolidate the emergency petition with the global petition concerning the probate rules that the Task Force will file in January 2019, which will include Rule 28.2.

RESPECTFULLY SUBMITTED this 3rd day of December 2018.

By _____
Rebecca White Berch (Justice, ret.), Chair,
Probate Rules Committee

Rule 28.2. Demand for Jury Trial in Guardianship and Conservatorship Proceedings.

(a) Demand. On any issue triable of right by a jury in a guardianship or conservatorship proceeding, a party may obtain a jury trial by filing and serving a written demand at any time after the proceeding is commenced, but no later than 30 days after the initial hearing on the petition. The demand may not be combined with any other motion or pleading filed with the court.

(b) Specifying Issues. In its demand, a party may specify the issues for which it requests a jury; otherwise, the party is deemed to have demanded a jury trial on all issues triable by jury. If a party has demanded a jury trial on only some issues, any other party may — within 10 days after the demand is served or within a shorter time ordered by the court — serve a demand for jury trial on any other or all factual issues triable by jury.

(c) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly filed and served. A proper demand may be withdrawn only if all parties consent.

(d) If a Demand Is Made. If a jury trial is demanded, the action must be tried by jury unless:

- (1) all parties file a stipulation to a nonjury trial or so stipulate on the record; or
- (2) the court, on motion or on its own, finds that there is no right to a jury trial on some or all of those issues.

(e) If No Demand Is Made. The court must try all issues on which a jury trial is not properly demanded. The court may, on motion, order a jury trial on any issue for which a jury might have been demanded.

(f) Advisory Jury; Jury Trial by Consent. In an action not triable of right by a jury, the court, on motion or on its own:

- (1) may try any issue with an advisory jury; or
- (2) may, with the parties' consent, order a jury trial on any issue, and the verdict will have the same effect as if a jury trial had been held as a matter of right.